can develop from either the provisions of the contract or the statute.[12] In Section 746 and their policies, the Policyholders benefitted from both sources of a property right. Section 746 created a firm expectation, and therefore a property right,[13] that only the policyholders could be the beneficiaries of any declared distribution of the $150 million surplus, an expectation reinforced by policy provisions entitling them to dividends declared from the Accident Fund.[14]

The only remaining question with respect to the surplus is whether the Policyholders have been deprived of their property rights therein through the sale. Michigan's only defense on this point is that the sale was "intact" and therefore the Policyholders have not lost anything. This is pure sophistry.

The $150 million dollar surplus may still exist, but instead of sitting in the Section 746 Revolving Fund where the exclusive distribution beneficiaries are the Policyholders, it is now sitting in Blue Cross and Blue Shield's coffers awaiting distribution to Blue Cross and Blue Shield, not the Policyholders.

The Policyholders have never challenged Michigan's authority as the Trustee of the Accident Fund Trust to sell the Fund and get out of the Accident Fund management business. Where Michigan erred – where it engaged in an unconstitutional conversion – was when it failed to return the $291 million sale proceeds to the Accident Fund Revolving Fund to be distributed exclusively to the Policyholders and, instead, converted those sale proceeds to general operating revenue for the State itself.[15] By whatever description employed, Michigan's actions are novel and should present special concern to a

---

[12] *See* Pet. App. at A-25, Mich Supreme Court Opinion, p 10 *citing Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 544, 9 L.Ed. 773 (1887) and *United States Trust v. New Jersey*, 431 U.S. 17, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

[13] *See Minty v. Board of State Auditors*, 336 Mich. 370, 58 N.W.2d 106 (1953).

[14] *See* Pet. App. at A-67.

[15] Although, the Policyholders claim an entitlement to the entire $291 million sales proceeds because all of the Fund's assets were held in Trust, their claim to the $150 million surplus in the Section 746 Revolving Fund is particularly firm.

Court dedicated to the protection of private rights when compromised by sovereign power.

B. The Michigan Supreme Court's Decision Conflicts with the Courts of Last Resort in all States Where this Issue Has been Decided

Michigan suggests that its Supreme Court's Decision is consistent with the highest courts of all other states to consider the issue. Michigan and a majority of its Supreme Court correctly note that those courts have always found a "Trust" where the policyholders remained on the risk and the State absolved itself of any Fund liability. Recognizing that Michigan's Accident Fund legislation carried these same hallmarks, the Michigan Supreme Court majority Opinion professes consistency with this national body of case law, because it found the Accident Fund to be a "Trust of sorts."[16] Michigan and its Supreme Court are guilty of Orwellian double speak.

In all other state courts of last resort, where the state carried no risk and the policyholders either could be assessed or would become uninsured for workers' compensation in the event of a deficiency, the fund was declared to be a trust in which the policyholders had vested property rights and in which the state could claim no general operating fund interest.[17] Conversely, where the state assumed the risk and the policyholders were relieved of further workers' compensation and assessment exposure, the fund was considered state property available for general operating utilization.[18]

---

[16] *See* Pet. App. at A-38 to A-40.

[17] *See e.g. Chez v. Industrial Commission of Utah*, 62 P.2d 459 (Utah 1936); *Moran v. State*, 534 P.2d 1282 (Ok. 1975); *State v. McMillian*, 136 P. 108 (Nev. 1913); *McArthur v. Smallwood*, 281 S.W.2d 428 (Ark. 1955); *Senske v. Fairmont & Waseca Canning*, 45 N.W.2d 640 (Minn. 1951); *State v. Musgrave*, 370 P.2d 778 (Idaho 1962); *State v. Olson*, 175 N.W. 714 (N.D. 1919).

[18] *See e.g. Methodist Hospital of Brooklyn v. State Insurance Fund*, 476 N.E.2d 304 (N.Y. 1985); *State ex rel Williams v. Industrial Commissioner of Ohio*, 156 N.E. 101 (Ohio 1927).

Until December 30, 1994, and the release of the Michigan Supreme Court Decision in this case, Michigan law had consistently followed this national body of precedent as is reflected in the decision of the Western District of Michigan in the *Baerwaldt* case, the Consent Decree in the *Baerwaldt* case, and the Michigan Court of Appeals decision in *Insurance Commissioner*. In this precedent we find the heart of the national case authority, namely, the dedication of the Fund assets for the Policyholders and a prohibition against the use of the assets for the State's general operating purposes.

While paying lip service to the Trust concept, the Michigan Supreme Court Majority denied the Policyholders either of these Trust benefits as defined under the national body of case law, the summary disposition in *Baerwaldt*, the Consent Decree in *Baerwaldt*, and the Court of Appeals' Decision in *Insurance Commissioner*. Instead, the Majority held that the words "in trust" were only used by the *Baerwaldt* and *Insurance Commissioner* courts in an "informal, descriptive sense," meaning that the Accident Fund had to follow its enabling statutes.[19]

This is a reduction of the term to meaninglessness. Of course, the Accident Fund, like the State of Michigan and like everyone else, must follow the law. This obligation alone cannot suggest a "Trust" in any fair sense of the word; especially, when the State, through its Legislature, may amend the statute at any time.

Indeed, to hold that the State Legislature may avoid its fiduciary obligations and the confiscatory prohibitions inherent in a trust by merely passing a statute saying so, replaces the "Trust" concept with that of a "blank check," ready to be negotiated upon effective drafting. The Michigan Supreme Court's spinning of the term "Trust" is as fanciful as the Michigan State Legislature's dance around the Policyholders' property rights in the existing assets of the Accident Fund.[20]

---

[19] See Pet. App. at A-39.

[20] Michigan's insecurity and insincerity are most obviously expressed in Subsections 4 and 5 of Act 198's Section 1. In Subsection 4, the State stripped all courts in the state of jurisdiction over any attempt to enjoin the sale, and provided

The vigorous dissent of Chief Justice Cavanaugh and Justice Levin in affirming the Trial Court offered the only non-cynical interpretation of the term "Trust." The Dissent notes that the Policyholders and their employees were not just the principal beneficiaries [as admitted by the Majority] but the *only* beneficiaries of the Accident Fund, at least until Act 198 unconstitutionally eliminated their rights:

> The assets of the Accident Fund were held in trust for the insured employers. They have a vested interest in the funds held in trust for their benefit. The insured employers were always, at least theoretically, "on the risk" while the State never had any risk. If these funds were squandered, they must provide benefits to any employee who suffers a compensable injury. These vested rights may not be deprived without just compensation.[21]

C. The Michigan Supreme Court's Decision Conflicts with this Court's Rulings in *Lynch*[22] and *Webb's*[23]

If the Accident Fund policies had stated that Fund revenue had to be placed in the Section 746 Revolving Fund and only the Policyholders could receive a distribution of such assets, Act 198's elimination of those obligations would obviously violate this Court's holding in *Lynch*, which precludes governmental contractual abrogation through legislation. Since Michigan concedes that statutory restrictions, such as those found in

---

that only the Court of Claims would have jurisdiction over any claim for damages. This was clever, because the Michigan Legislature has exclusive control over the Court of Claims' jurisdiction. Indeed, in Subsection 5, the State stated that there could be no claim for damages against it arising out of the sale, effectively leaving the Policyholders without a remedy. *See* Mich. Comp. Laws §418.701a(4) & (5). Fortunately, the State cannot eliminate the Policyholder's constitutional rights. That it would resort to such drastic measures as this demonstrates a recognition that it should not win this case in court.

[21] See Pet. App. at A-49.

[22] *Lynch v. United States*, 292 U.S. 571 (1934).

[23] *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980).

Section 746, can also be the source of contractual rights[24], *Lynch* is violated here as surely as if the terms of Section 746 were expressed in the policies themselves.

If it had expressly authorized Michigan to directly take for its general fund the $150 million in cash surplus on deposit in the Section 746 Revolving Fund, Act 198 would obviously contravene this Court's holding in *Webb's*, which prohibited the public taking of funds dedicated to the future use of a private class of entities. Since Act 198 accomplishes the same result by authorizing Michigan to sell the Revolving Fund and pocket the proceeds, *Webb's* is surely contravened here.

Lynch and *Webb's* effectively urge this Court to accept the Petition and to reverse the Michigan Supreme Court Majority's Decision.

CONCLUSION

No one can question the fact that the general public is becoming increasing cynical and distrustful of government motives, intentions, and actions. A state supreme court's use of a term like "Trust" when it really doesn't adhere to the common ramifications of that word, and a state legislature's taking of $291 million by selling a privately dedicated fund for state operating purposes can only contribute to this cynicism among the 40,000 Policyholders. Michigan's actions deserve review by this Court.

Dated: May 16, 1995

Respectfully submitted,

LAW, WEATHERS & RICHARDSON, P.C.

DOUGLAS W. VAN ESSEN (P33169)
Attorneys for Petitioners

800 Bridgewater Place
333 Bridge Street, N.W.
Grand Rapids, Michigan 49504-5360
(616) 459-1171

---

[24] Respondent's Reply, p 10.